

OPD APPELLATE WINS - MAY TO AUGUST 2009

The Appellate Section of the OPD had major wins in the middle third of this year.

CONFESSIONS AND OTHER STATEMENTS

Adjudication of delinquency reversed by the Appellate Division. The trial judge erred in denying T.R.B.'s motion to suppress his statements to Keller. Although Keller's initial questioning of T.R.B. was prompted by his concern for the juvenile's wellbeing, after T.R.B. denied wanting to kill himself Keller then confronted him with the accusation [that] a crank call was made from his phone to a suicide hotline, to which T.R.B. responded that he didn't have his phone the whole time, that one of his friends must have done it. At the point when Keller realized that T.R.B. was not a likely suicide, but rather was a possible participant in a criminal offense, the officer's questioning took on a potentially inquisitorial nature. At that point, T.R.B. was in custody within the purview of Miranda protections. Therefore, T.R.B. was entitled to the protections afforded by Miranda. (State in the Interest of T.R.B., July 30, 2009; Abby P. Schwartz, A.D.P.D.)

Suppression of confession affirmed by the Appellate Division. The State appealed from the order suppressing an incriminating statement defendant gave to the police concerning his involvement in the murder of John Zephirin, after the interrogating officers assured him that the equipment recording the interrogation had been turned off pursuant to defendant's explicit request. After conducting an evidentiary hearing, the trial court granted defendant's motion to suppress his statements, finding that the interrogating officers violated defendant's right to not have his statements electronically recorded in any form. In so holding, the judge found unavailing the officers' attempt at obfuscating defendant's direct and explicit request to speak "off the record," by asking him: "you want the video off," to which defendant responded "I want it off." He concluded that the officers' decision to merely turn off only the video part of the equipment, leaving the audio section fully operational, violated defendant's rights. Detective Koczur's ostensible clarification of defendant's straight forward request to "take [him] off [the] record," was a mere subterfuge, intended to thwart defendant's right under Miranda not to have his statements

electronically recorded. (State v. Abdul Griggs, July 21, 2009; Cecelia Urban, A.D.P.D.)

Suppression of juvenile's confession by trial court re-instated by the New Jersey Supreme Court. The filing of the complaint and obtaining of a judicially approved arrest warrant by the Prosecutor's Office was a critical stage in the proceedings, and pursuant to N.J.S.A. 2A:4A-39b(1), defendant had the right to counsel and could not waive that right except in the presence of and after consultation with counsel. A juvenile delinquency complaint may be filed by anyone, but when a crime is alleged in the complaint, the prosecutor's consent is needed before the court may divert the complaint. R. 5:20-1(c). Thus, the prosecutor plays a heightened role when it is alleged that the juvenile committed conduct that, if committed by an adult, would be a crime. Indeed, when the Prosecutor's Office files a juvenile complaint, it already has determined that it has a prima facie case against the defendant. Consequently, because the juvenile does not have the right to indictment, the filing of the complaint by the Prosecutor's Office takes on added significance. In the present case, the Prosecutor's Office investigated the victim's complaint, and based on its investigation, filed the juvenile complaint and sought an arrest warrant. Certainly, any further questioning of defendant was for the purpose of buttressing the State's case against him. Under those circumstances, the significant level of involvement by the Prosecutor's Office and the judicially approved arrest warrant satisfied the "critical stage in the proceeding" necessary to trigger defendant's statutory right to counsel under N.J.S.A. 2A:4A-39. Consequently, in the absence of counsel, defendant could not waive his Miranda rights. (State in the Interest of P.M.P., a Juvenile, July 29, 2009; Amira R. Scurato, A.D.P.D.)

Conviction reversed, confession suppressed by the Appellate Division. Because of, among other things, the near three-hour custodial interrogation with only a brief cigarette break that preceded the instructions required by Miranda, the State failed to prove the voluntariness of defendant's waiver and confession beyond a reasonable doubt. Even deferring to the judge's credibility findings, the record is too insubstantial to uphold a finding that the state proved beyond a reasonable doubt that the pre-warning interrogation did not undermine "defendant's ability to assert his right to remain silent and his

ability to knowingly, voluntarily, or intelligently waive that right." (State v. Brian M. Yohnnson, May 19, 2009; Cecelia Urban, A.D.P.D.)

CONFRONTATION

Convictions reversed by the Appellate Division. At trial, defense counsel moved to exclude testimony regarding the content of the 9-1-1 call to the police and the statements of the anonymous tipster who identified defendant as the possessor of the gun found underneath the Cadillac. Both motions were denied by the trial judge, who ruled that the content of the 9-1-1 call could be utilized by the prosecution to show the police officers' state of mind, but that a curative instruction would be given. The Court found that the content of the 9-1-1 call was non-testimonial in nature, since it was elicited to permit the police to respond to an emergency. However, it reached a different conclusion with respect to the statements of the anonymous tipster. Those statements, made after any danger had passed, since the perpetrator no longer possessed the weapon that was previously brandished, and uttered for the purpose of identifying defendant to the police so that he could be subject to criminal prosecution, were clearly testimonial in nature. Because the tipster was never identified, and was not subject to cross-examination at any stage of defendant's criminal prosecution, the admission of the hearsay resulted in a violation of defendant's Sixth Amendment rights. See also SEARCH AND SEIZURE. (State v. Eugene Basil, May 4, 2009; William J. Sweeney, Designated Counsel)

CRIMES AND OFFENSES - ELEMENTS

Convictions for **aggravated sexual assault** reversed by the Appellate Division. State's expert Dr. D'Urso's testimony, considered in light of the victim's own trial testimony, was insufficient to support a finding that the victim was **'mentally defective' within the intent of N.J.S.A. 2C:14-1(h)**. The victim's testimony indicated that she was well aware of the distinctively sexual nature of defendant's conduct and of her right to refuse to engage in such activity. In fact, she actively resisted defendant's sexual assaults. In concluding that the victim was "functionally unable to be self-protective," Dr. D'Urso relied on the fact that the victim returned to defendant's home after he sexually assaulted her. However, the

victim's presence in defendant's home was not voluntary. Her grandfather, who was her custodian, had directed the victim to go to defendant's home when he was not home so that defendant could take care of her. Consequently, the only way the victim could have avoided going to defendant's home was to disobey her grandfather's direction. Such circumstances are insufficient to establish that the victim was incapable of exercising the right to refuse to engage in sexual conduct with defendant. (State v. William Fisher, July 30, 2009; Brian Plunkett, A.D.P.D.)

Convictions for simple assault and **endangering the welfare of a minor** reversed, other convictions affirmed by the Appellate Division. Defendant's actions in leaving his seriously-wounded partner in the apartment, knowing there was no phone to summon help, and knowing the two children were there and would be exposed to the bloody scene, were sufficient for the jury to find beyond a reasonable doubt that he knowingly "endangered their welfare." However, the convictions for endanger still had to be reversed because the jury instructions never defined "abused or neglected" for the jury. See also **EVIDENCE**. (State v. Nisees Ingram, June 15, 2009; Michele C. Buckley, Designated Counsel)

Count seven of the indictment, which charges the first-degree crime of **causing or permitting a child to engage in prohibited sexual acts if the person knows or intends that the act maybe photographed or reproduced in any manner and is "a parent, guardian or other person legally charged with the care and custody of the child,"** vacated by the Appellate Division. The State argued that the defendant lived with Jane and her mother for eight years and should be considered her "parent." There is no substance to this argument. There certainly was no de jure parental relationship, and the evidence does not establish a de facto relationship of parent and child. While Jane may have lived with her mother and defendant for about eight years, she visited her natural father on a regular basis and went to live with him after 1999. Defendant was the live-in boyfriend who babysat for Jane and assumed responsibility for her care when Sally was working. Defendant cannot be legally convicted of the elevated offense under N.J.S.A. 2C:24-4b(3). (State v. T.M., May 28, 2009; Jerry Soffer, A.D.P.D.)

Possession of CDS charge reversed, remanded for new trial by the Appellate Division. The jury was never

charged on the issue of **weight** nor was weight included in the jury verdict sheet. The State's narcotics expert at trial opined that in order to reach a reasonable value of the drugs, he would "have to weigh it to be more accurate." Further, the lab report that was entered into evidence lists the net weight of the marijuana in grams, while the statute's weight requirements are in ounces and pounds. The jury was never advised of the conversion rate, i.e., that there are 28.35 grams per ounce. As a result, the jury could not have determined that defendant possessed more than one ounce of marijuana. (State v. Derrick Wright, June 12, 2009; Monique Moyes, Designated Counsel)

Adjudication of delinquency vacated by the Appellate Division, case remanded for further proceedings. In order for the court to have found I.W. to be delinquent for violating N.J.S.A. 2C:14-2b, the trial court had to find beyond a reasonable doubt that I.W. committed an act of "sexual contact" with P.O. who, at the time, was less than thirteen-years old and I.W., at the same time, was at least four-years older than P.O. An element of the offense of criminal sexual contact is that the offender commits the contact for the purpose of degrading the victim or for the offender's own personal sexual arousal or gratification. In this case, the trial court did not address that element of the offense. Indeed, the trial court's statement at the disposition hearing could lead one to conclude that I.W.'s actions were ones of experimentation and not "for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor." Fact finding on the purpose element of the offense was necessary to evaluate what the trial court considered, just as instructions are reviewed in a jury trial to determine legal error. Only when the trial court makes specific findings of fact regarding the elements of an offense can there be effective appellate review. (State in the Interest of I.W., a Juvenile, May 27, 2009; Michael C. Kazer, Designated Counsel)

CUMULATIVE ERROR

Convictions reversed by the Appellate Division, who agreed with three of defendant's points regarding trial errors. The trial court was persuaded by the prosecution's mistaken legal arguments and erred in (1) barring the testimony of a defense witness offered to impeach the State's cooperating co-defendant, (2) threatening to give

an adverse inference charge to the jury when the defense announced its intent not to call alibi witnesses, and (3) admitting some of the statements made to the police by a witness who had died before the trial. The first of these errors by itself requires reversal of defendant's conviction. Cumulatively, the errors clearly cannot be deemed harmless beyond a reasonable doubt. (State v. Bruce D. Beacham, Jr., July 21, 2009; Michael Confusione, Designated Counsel)

EVIDENCE

Convictions reversed by the Appellate Division. To prove the eluding charge, the State not only had to establish defendant's identity, but also to prove that he "knowingly flee[d] or attempt[ed] to elude any police or law enforcement officer." Accordingly, if **defendant was unlicensed while operating the stolen vehicle** and if he is stopped by the police, he will not be able to exhibit a license, and that **would explain why he would flee** from the police, not to mention the fact that the vehicle itself is stolen. Nevertheless, the court's **failure to properly provide the jury with a limiting instruction**, both when the evidence was introduced and at the end of the case, requires reversal. [A]lthough the court provided the jury with an instruction at the end of the trial, the instruction was inadequate. The instruction not only failed to inform the jury affirmatively of the limited purpose (defendant's motive for fleeing) on which it could consider the evidence, but also failed to inform the jury of the prohibitive use of the evidence. The instruction left the door open for the jury to use the evidence for any purpose it desired. This open-door instruction permitted the jury to infer that defendant was not a law-abiding individual. Even if relevant, without the limiting instruction, the probative value of the evidence was outweighed by its prejudice to defendant. (State v. Dwayne Ames, July 22, 2009; Susan Brody, A.D.P.D.)

Convictions affirmed in part, reversed in part by the Appellate Division because the trial court **erroneously permitted the State to elicit the prior inconsistent oral statements that Funderburg and Leary had given to Detective Manzo concerning the assailant's identity**. The statements did not qualify under the hearsay exception, N.J.R.E. 803(a)(1). Although Manzo could have properly testified that he had acted on information obtained during his

investigation, it was not necessary for him to testify in such detail as to Funderburg's and Leary's out-of-court statements, in which defendant was identified as the assailant. Permitting the jury to hear Manzo's testimony concerning the witnesses' oral statements improperly bolstered the State's contention that the transcribed statements testified to by Thomas were inconsistent with the witnesses' testimony, permitting the jury to accept the written statements provided to Thomas for substantive purposes. (State v. Albert L. Barnes, August 20, 2009; Richard W. Berg, Designated Counsel).

Conviction Reversed by the Appellate Division because the **admission of the other crimes evidence, that defendant sexually assaulted A.G. in Jamaica and in Paterson, was a mistaken exercise of discretion.** The trial court did not conduct an N.J.R.E. 104 hearing to determine if the Cofield test had been met as to the Jamaica and Paterson sexual assaults. Based on independent review of those factors, the Court concluded that the State failed to satisfy the fourth prong of the test. The record contained extensive evidence of defendant's sexual assaults against A.G. The additional uncharged allegations of sexual assault added little to the State's case, and did not outweigh the prejudice inherent in permitting the jury to hear about the other crimes, which effectively established defendant's criminal disposition to commit the offenses. The same conclusion was reached regarding the other crimes evidence involving defendant's statement to A.G. that he had sexual relations with K.F. The limiting instructions provided by the judge were inadequate to cure the prejudice because they were belated and incomplete. See also **PROSECUTORIAL MISCONDUCT**. (State v. R.F., May 15, 2009; Michael C. Kazer, Designated Counsel)

Convictions reversed by the Appellate Division. Defendants claims that the trial court erred in admitting into evidence certain **other-crimes evidence** regarding an earlier armed robbery involving defendants in a barbershop in the Bronx. Since ballistic evidence established that the same gun was used in both the Bronx barbershop robbery and the Barnegat killings, evidence of defendants' involvement in the Bronx barbershop robbery was **properly admitted on the issue of identity.** However because the evidence was **not properly sanitized**, unnecessary and highly prejudicial evidence was presented to the jury. The jury learned that defendants had participated in an extremely

violent robbery in which Gillispie unnecessarily shot three innocent people, seriously injuring one of them. This evidence, depicting defendants as violent and dangerous individuals, had the capacity to prejudice and inflame the jury and to produce an unjust result. (State v. Dwayne Gillispie and Gregory Buttler, August 18, 2009; Alan I. Smith, Designated Counsel, for Gillispie; Michael Confusione, Designated Counsel, for Buttler)

Convictions for simple assault and endangering the welfare of a minor reversed, other convictions affirmed. "[D]efendant argues that the judge mistakenly exercised his discretion by denying him the opportunity to cross-examine Amera regarding her drug use on the day of the shooting, and further refused to permit defendant from testifying about it himself. He argues that any testimony regarding Amera's ingestion of drugs on the day of the shooting was relevant, given that he and Amera were the only witnesses to the actual event and their testimony was in direct conflict.... [W]e have no doubt that **defendant should have been permitted to freely cross-examine Amera regarding any drug use by her on the day of the shooting.** This evidence was highly relevant given the divergent accounts of the only two witnesses to the shooting itself. Amera supplied no details as to how the shooting actually occurred, except that defendant had the gun in his hand when it went off. Defendant, to the contrary, testified that Amera asked him to see the gun, that he removed the clip from the weapon, and believed it was not loaded. He also claimed that Amera was "playing" with the weapon when it went off. Whether Amera had ingested drugs that day, and whether she was still feeling any effects, was highly relevant to her ability to perceive the events and her general credibility as a witness. To the extent the judge limited defendant's cross-examination of her, he mistakenly exercised his discretion." See also CRIMES AND OFFENSES - ELEMENTS. (State v. Nisees Ingram, June 15, 2009; Michele C. Buckley, Designated Counsel)

Conviction for conspiracy to possess CDS with intent reversed by the Appellate Division, other convictions and sentence affirmed. The Court reversed defendant's conviction for [conspiracy] because the **testimony of the State's expert witness exceeded what was permissible** in a drug prosecution trial. The prosecutor employed a factually aligned hypothetical when eliciting Lt. Shuster's opinion on distribution. However, Lt. Shuster's opinion

that the two men illustrated in the hypothetical "were conspiring together to sell CDS" added nothing that could validly be considered to "assist the trier of fact to understand the evidence." N.J.R.E. 701. Rather, Lt. Shuster's last comment inappropriately asserted a factual statement that a conspiracy was established and expressed a conclusion on the ultimate legal issue that the conspiracy was to distribute CDS. The explicit statement from the State's lead fact witness, who also was in charge of the surveillance and arrest, that "I believe they were conspiring together to sell CDS" went too far and was designed to unfairly answer the actual question of defendant's guilt. (State v. William Shepard, July 15, 2009; Richard Sparaco, Designated Counsel)
<http://www.judiciary.state.nj.us/opinions/a6205-06.pdf>

GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS

Case remanded for a new trial on all issues by the Appellate Division because the trial judge deprived defendant of his right to counsel of his choice. The trial judge concluded that defendant's private attorney was not permitted to represent him in this matter while he was, or had been, representing defendant in a criminal matter. There is no indication that the trial judge's decision was grounded on timing concerns or the efficient administration of the court. She also did not find that defendant's repeated requests to be represented by his private attorney were merely a stalling tactic, as suggested by the Law Guardian. However, the trial court misunderstood the case that she relied on, which was expressly limited to Division and criminal proceedings predicated on the same act or acts of abuse. Even if the matters were related, defendant's private attorney had represented him in the Division proceedings for well over a year and had full discovery from the Division prior to trial. The trial judge stated on the record that she heard from defendant's private attorney on the first trial day for the proceedings against defendant and was told that he was willing to represent defendant and thought he was still doing so. Defendant thereafter represented that his private attorney was ready to proceed with the trial, so obviously no delay would have resulted from allowing the private representation because defendant's private attorney had full discovery in the case. Depriving defendant of an attorney who had represented him for quite some time in this case and substituting a public defender who never met with defendant

constitutes an abuse of discretion capable of causing defendant manifest wrong or injury. (DYFS v. R.B., Jr./Matter of R.J.B. and L.M.B., June 26, 2009; Catherine F. Reid, Designated Counsel; Phyllis G. Warren, A.D.P.D., Law Guardian)

Finding of abuse and neglect by R.G. reversed by the Appellate Division. R.G., the father of a three-year-old son, a ten-year-old daughter, and an adult daughter, appeals from a determination by a Family Part judge that, as the result of an act of domestic violence committed by R.G. on his wife in the presence of the son, R.G. had abused and neglected his minor children. Contrary to precedent, the Family Part judge failed to make any finding as to whether either the son or the daughter were abused and neglected children as statutorily defined, concluding only that R.G. had committed an "act of abuse and neglect under the statute." In that regard, the evidence was insufficient to support the conclusion that R.G. was grossly or wantonly negligent in assaulting his wife while his son was present in the bed, thereby exposing him to a substantial risk of harm. The record does not establish that, before the attack occurred, R.G. knew that the child was in the bed or that he had any reason to anticipate his presence; it establishes only that he recognized the child's presence at some time -- most likely, when the boy awoke and ran from the room. Further, there is no evidence of substantial emotional harm resulting from the act of domestic violence. Nor does the record reflect that imminent danger of harm existed after the incident. (DYFS v. R.G./ Matter of K.G. and K.G., May 11, 2009; Michael S. Harwin, Designated Counsel, for R.G.; Noel C. Devlin, A.D.P.D., Law Guardian)

Termination of parental rights reversed by the Appellate Division. A mother and father appealed from orders terminating their parental rights to their daughter, who was born in September 2004 and removed from her parents' care in March 2005. The father also appealed from the order allowing the initial removal of his daughter, the order finding he abused or neglected his child, and the order approving termination of parental rights as a suitable permanency plan. At the child's birth, the mother tested positive for cocaine; the baby did not. The sole evidence of harm inflicted by the father upon his daughter was his failure to notice that she was not appropriately secured in her car seat. The Court found that the trial

judge had made findings of fact that were unsupported or not justifying termination of parental rights. (DYFS v. A.M.H. and G.L./Matter of C.L., May 5, 2009; Alan I. Smith, Designated Counsel, for A.H.; Thomas G. Hand, Designated Counsel, for G.L.; Melissa R. Vance, A.D.P.D., Law Guardian)

Order terminating parental rights reversed by the Appellate Division and remanded for further proceedings geared toward reunification of mother and child. The judge's finding on the first prong was based upon the mother's history of substance abuse. Although the evidence was overwhelming that "[t]he child's safety, health or development has been . . . endangered" by Donna's past conduct, N.J.S.A. 30:4C-15.1a(1), there was no dispute that those issues no longer constituted an obstacle to reunification. The record does not contain clear and convincing evidence to support the judge's findings on the second prong. The judge could not have reached "a firm belief or conviction" about the extent or weight of the mother's anger and emotional issues because Dr. Loving indicated he was less than certain. Although he provided the ultimate opinion the Division sought, Dr. Loving also stated there were "some question marks in terms of [Donna's] ability to maintain stability and address the issues that might be risks to her child," and "some uncertainties including how effectively [Donna] is able to manage her anger and have relationships with people around [the child]." An expert's conceded "question marks" and "uncertainties" about such highly relevant facts would hardly permit a factfinder to reach a "firm conviction" of the truth of the matter. (DYFS v. D.H./Matter of T.J.L.H., July 2, 2009; Ruth Harrigan, Designated Counsel, for D.H.; Noel C. Devlin, A.D.P.D., Law Guardian)

Order terminating L.H.'s parental rights reversed, case remanded for further proceedings by the Appellate Division, which concluded that there was not adequate evidence to establish that the children's relationship with L.H. will put these children at risk of serious harm. Given her continued contact with the children prior to the termination decision on April 23, 2008, the positive report on the joint counseling session, her successful discharge from the SCWS program, the delay and abrupt termination of the non-offending parent therapy, the successful visitations and the evidence of some bond with the children, albeit weaker than the bond that has developed

between the children and their grandparents, the Division did not establish grounds for termination. The Division had the obligation of establishing the continuing nature and extent of the risk of harm. L.H. was not obligated to show the court that she is capable of changing to be a safe parent. (DYFS v. L.H./Matter of T.C. and H.H., July 7, 2009; Beth Anne Hahn, Designated Counsel, for L.H.; Noel C. Devlin, A.D.P.D., Law Guardian)

Termination of C.L.'s parental rights reversed, case remanded for further proceedings by the Appellate Division. The trial court's opinion was so general and conclusory that the Court could not conclude with confidence that the requisite fact sensitive and particularized analysis occurred. It remanded for more detailed findings upon the criteria of the best interests standard in N.J.S.A. 30:4C-15.1 and for articulation of the facts with particularity to show that each prong of the best interests standard has been met by clear and convincing evidence. (DYFS v. C.L./Matter of T.J.B., J.J.B., and J.J.B., May 7, 2009; Anna F. Patras, Designated Counsel, for C.L.; Nancy E. Scott, A.D.P.D., Law Guardian)

DYFS v. V.M. and B.G./Matter of J.M.G., ? N.J. Super. ?, 2009 N.J. Super. LEXIS ? (July 16, 2009) - Findings of abuse and neglect under Title 9 affirmed as to V.M., reversed as to B.G. by the Appellate Division. The judge's findings as to V.M. were supported by the evidence adduced at the hearing, but as conceded by the Deputy Attorney General representing DYFS at oral argument, they were not supported as they related to B.G. The majority disagreed with the concurring judge's discussion of whether V.M.'s refusal to consent to a cesarean section (c-section) can, as a matter of law, be considered an element of abuse and neglect because the issue did not need be decided. While the judge, in fact, did rely, in part, on such refusal in his findings of abuse and neglect, there was substantial additional evidence of abuse and neglect that supported the ultimate findings. This view is consistent with DYFS' acknowledgement at oral argument that the judge need not have considered V.M.'s refusal on the merits of the issue of abuse or neglect. Judge Carchman, concurring, would hold "that even with the limited concession of DYFS as to the narrow utility of V.M.'s refusal to have a c-section, the issue remains extant and requires a level of judicial scrutiny. Consideration of V.M.'s refusal to submit to a c-section, in my view, is improper and beyond the

legislative scope of the child-protective statutes... The decision to undergo an invasive procedure such as a c-section belongs uniquely to the prospective mother after consultation with her physicians. To allow such a decision to factor into potential charges of abuse or neglect requires a prospective mother to subjugate her personal decision to a governmental agency's statutory interpretation creating a scenario that was neither contemplated nor incorporated within the four corners of the relevant statutory language. Her decision on matters as critical as this invasive procedure must be made without interference or threat. V.M.'s decision to forego a c-section had no place in these proceedings." (DYFS v. V.M. and B.G./Matter of J.M.G., July 16, 2009; Ruth Harrigan, Designated Counsel, for V.M.; Miles Lessem, Designated Counsel, for B.G.; Christopher A. Huling, A.D.P.D., Law Guardian)

Termination of parental rights and guardianship order vacated, remanded for reconsideration by the Appellate Division, which was not satisfied that the Division met its burden of proof with respect to N.J.S.A. 30:4C-15.1(a)(2) and (a)(4). Specifically, DYFS failed to prove that J.V. and E.R. displayed an unwillingness to abate the harm to Cynthia. In addition, the absence of expert testimony about Cynthia's bonds with her biological parents creates significant doubt that the fourth prong of the statute has been met. (DYFS v. J.V. and E.R./Matter of C.R., June 16, 2009; Anna F. Patras, Designated Counsel, for J.V.; Beatrix W. Shear, A.D.P.D., for E.R.; Patricia A. Dulinski, Designated Counsel, Law Guardian)

Appeal dismissed as moot by the Appellate Division. The dispositive issue presented by this appeal is whether a parent's appeal of an order that dismisses a Title 9 action brought by the Division of Youth and Family Services (DYFS) before there has been an adjudication of abuse or neglect and entry of a final order of disposition is mooted by DYFS' filing of a Title 30 action for the termination of parental rights. The Court concluded that DYFS' filing of a Title 30 action and the entry in that action of an order regarding custody and related matters such as visitation, which supersedes any orders entered in the Title 9 action, moots the parent's appeal from the dismissal of the Title 9 action before an adjudication of abuse or neglect. (DYFS v. A.P. and F.H./Matter of S.H., July 17, 2009; Beatrix W. Shear, D.P.D., and Ronald C. Appleby, Designated Counsel,

for A.P; Melissa R. Vance, A.D.P.D., Law Guardian)

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

Granting of PCR affirmed by Appellate Division. Defendant testified that he informed his attorney, White, numerous times that he had a permanent restraining order against F.B., and the PCR judge found defendant to be credible. Reasonable investigation on White's part would have revealed that, while F.B. secured a temporary restraining order against defendant, the court vacated that temporary order and granted defendant a permanent order against her. This occurred approximately two weeks before F.B. took D.B. to the police station to report defendant's alleged abuse. Because White did not adequately investigate the abuse reports and restraining orders and failed to interview witnesses, his trial strategy is not entitled to the high level of deference typically afforded to counsel. The PCR judge found that White could have raised reasonable doubt as to defendant's guilt by bringing the chronology of events to the jury's attention. The judge also expressed concern that White did not make a meaningful effort to interview Williams, the potential defense witness, who may have raised doubt as to D.B.'s credibility. The PCR judge's finding of ineffective assistance of counsel is supported by substantial credible evidence and, therefore, affirm the PCR judge's finding that there was a "reasonable probability that these deficiencies materially contributed to defendant's conviction" and his constitutional right to counsel was, therefore, violated. (State v. Lewis I. Hagan, August 7, 2009; Alison Perrone, Designated Counsel)

Convictions reversed and indictment dismissed. With advice of counsel, defendant Louis E. Veney pled guilty to the charge of third-degree unlawful possession of a weapon. The Appellate Division concluded that the State was barred from prosecuting the charge of unlawful possession of a weapon pursuant to the mandatory joinder rule, N.J.S.A. 2C:1-8b and Rule 3:15-1(b). Alternatively, even if the mandatory joinder rule was not applicable to the present matter, the State should have been barred from proceeding to trial on Count One by the doctrine of fundamental fairness. The failure to move to dismiss Counts One and Two prior to defendant entering a plea cannot be deemed trial strategy. The failure to so move denied defendant the effective assistance of counsel. (State v. Louis E.

Veney, Jr., August 25, 2009; Adam W. Toraya, Designated Counsel)

JURY DELIBERATIONS

Convictions reversed by the Appellate Division. The trial judge should have granted a mistrial due to juror misconduct during deliberations that led to the replacement of juror 14 with an alternate. Although juror 14 denied conducting outside research, her misconduct in using the internet to research and obtain extraneous information, as the judge found had occurred, was related to the case and to her interactions with her fellow jurors, with whom she shared that information. Juror 14's conduct did not fall within the inability-to-continue standard, and she should not have been singularly removed from the panel for her behavior. The problem was not personal, but pervasive, i.e., juror 14's misconduct tainted the jury as a whole. Accordingly, a mistrial should have been declared. (State v. Justin A. Scott, Damian Free, and Herbert Mays, July 20, 2009; Steven M. Gilson, Designated Counsel, for Scott; Alison Perrone, Designated Counsel, for Free; Alan I. Smith, Designated Counsel, for Mays)

JURY INSTRUCTIONS

Conviction reversed by the Appellate Division because the trial court erred in not instructing the jury that **co-defendant Brown's guilty plea to Count One could not be considered as substantive evidence of defendant's guilt**, but only for credibility purposes. The State acknowledged that the trial court did not provide a limiting instruction regarding the use of Brown's guilty plea. However, the State counters that the error was harmless. Brown testified that he pled guilty to a charge of conspiracy arising out of the same events that led to defendant's indictment. Part of his plea agreement with the State was to provide "truthful testimony" at defendant's trial. Brown testified to the events that led up to him entering defendant's motor vehicle where the drugs were found. Without a proper limiting instruction, the jury was free to consider Brown's plea as substantive evidence against defendant. (State v. Darral V. Black, July 23, 2009; Monique Moyse, Designated Counsel)

Convictions reversed by the New Jersey Supreme Court. Defendant Alonzo Hill was convicted of first-degree robbery

and related offenses for his role as an accomplice in a 2003 robbery of a Newark commercial establishment. According to the State's theory of the evidence, Hill was a knowing participant in the robbery even though he did not get out of the car in which he drove the other participants to Newark. The jury heard differently from Hill, who claimed a lack of any prior knowledge about the robbery. He testified that his teenage nephew (N.G.) and two companions never said anything in his presence about an intended robbery when he drove them to Newark. In the jury's evaluation of the clashing evidence about Hill's mental state, the State received the benefit of a missing witness, or Clawans [38 N.J. 162 (1962)], charge, which was delivered by the court over the defense's objection. The court instructed the jury that it could infer, based on Hill's failure to call his nephew as a witness, that the nephew's testimony would have been adverse to Hill's interest. **[P]roviding a Clawans charge in those circumstances constituted reversible error.** The charge, which favored the State on an element of its required proofs, had the inescapable effect of undermining defendant's entitlement to benefit from the presumption of innocence and to demand that the State bear the burden of proving, beyond a reasonable doubt, all elements of the charges against him. The Court further held that **Clawans charges generally should not issue against criminal defendants.** The inclusion in a criminal trial of a Clawans charge from the court risks improperly assisting the State in its obligation to prove each and every element of a charged crime beyond a reasonable doubt. (State v. Alonzo B. Hill, July 14, 2009; Susan Brody, A.D.P.D.)

Convictions reversed by the Appellate Division. Here, the question was an unambiguous request to know whether mere presence was enough to support a guilty verdict based on constructive possession. That question has an unambiguous and well-settled legal answer, which is "no"; **mere presence**, without more, is a legally insufficient basis for a finding of constructive possession and "all of the surrounding circumstances" must be considered in their "totality" in evaluating whether the State has established that a defendant was in constructive possession of contraband. By directing the jurors to resolve a question about the law by using "their own good common sense to analyze the charge," the judge misinformed them. True, the question of guilt was for "the jury's determination" based on their "common sense" consideration of the evidence, but

the legal sufficiency of "mere presence" is a matter of law, not a question committed to the common sense of the jurors deciding individual cases. The court's response to the jurors' question, read as whole, was clearly capable of leading the jurors to conclude that they were free to infer that the State proved defendant's constructive possession by showing that he was "in the room with other people and drugs are present" and that they were free to draw the same conclusion about defendant's presence in a room with other people and guns. (State v. Heriberto Rivera, August 5, 2009; Alison Perrone, Designated Counsel)

Reversal of conviction for **armed robbery** by Appellate Division affirmed by the New Jersey Supreme Court. This appeal centered on the meaning of the phrase "armed with a deadly weapon" as used in the grading provision of the robbery statute, which elevates the crime from second to first degree. N.J.S.A. 2C:15-1(b). Defendant stated that she took money from the victim's purse, and that a folding knife fell out of her pocket during a subsequent struggle with the victim. She maintained that she never used or intended to use the knife as a weapon. During deliberations, responding to a question from the jury, the trial judge said that defendant's "intent with respect to the object [(the folding knife)] is irrelevant." The Supreme Court agreed with the approach of those cases, which were decided under the robbery statute, that stand for the proposition that, where the potential weapon is not a firearm, a defendant cannot be considered to have been "armed with a deadly weapon" unless he had immediate access to the potential weapon and an intent to use it in a way that is "capable of producing death or serious bodily injury." The Court rejected the State's argument that "armed with a deadly weapon" requires proof only that a defendant has possession of the weapon in a manner which makes it readily available for use and that intent has no relevance to that analysis. (State v. Maribel Rolon, July 13, 2009; Alison S. Perrone, Designated Counsel)

Conviction for **first degree kidnapping** reversed by the Appellate Division, case remanded for re-sentencing on molded count of second degree kidnapping. The trial court's jury instructions on the charge of first-degree kidnapping did not inform the jury that the State must also prove, beyond a reasonable doubt, that defendant knowingly harmed the victim or that defendant knowingly failed to release the victim in a safe place prior to his

apprehension. Under these circumstances, the conviction for first-degree kidnapping could not stand as a matter of law. (State v. Marty D. Ross, July 10, 2009; Robert Seelenfreund, A.D.P.D.)

Convictions reversed by the Appellate Division. Within its charge to the jury, the trial court dealt appropriately with the definition of controlled dangerous substances, purposeful and knowing conduct, and the concept of actual and constructive possession. At no point, however, was the jury instructed that to find defendant guilty under the second count of the indictment, the jury had to find that the cocaine had a weight of five ounces or more. And the jury verdict form which we have set forth was also silent on the topic. Defendant argues that the **failure of the trial court to require the jury to make a finding whether the quantity of cocaine possessed was five ounces or more constituted plain error**. The Court rejected the position put forth by the State in this appeal, that the trial court's omission could be cured by the stipulated admission of the laboratory reports, which did note the weight of the cocaine recovered from each location. The trial court clearly and correctly told the jury that it was not bound by the parties' stipulation of admissibility and that "undisputed facts can be accepted or rejected by the jury in reaching a verdict." Even in the face of what may seem obvious and indisputable, there is simply no substitute for a jury verdict. See also **PROSECUTORIAL MISCONDUCT**. (State v. Alquadin Sales, July 27, 2009; Robert L. Sloan, A.D.P.D.)
<http://www.judiciary.state.nj.us/opinions/a2353-07.pdf>

JURY ISSUES - MISCELLANEOUS

The Appellate Division agreed with defendant's argument concerning the **waiver of his right to jury trial** and therefore reversed his conviction. There was no mention during the pretrial conference of defendant's jury trial waiver, much less the detailed colloquy that the Court required in State v. Dunne, 124 N.J. 303 (1991). Here, the judge engaged in no discussion with defendant concerning his jury trial waiver. As a result, the judge never informed defendant that he had no obligation to waive his right to a jury trial, nor did the judge ever ascertain, as required by Dunne, that defendant's waiver was "knowingly and competently" given. Ibid. The judge also failed to determine whether the waiver was "tendered

in good faith" or instead given to secure some "impermissible advantage." Ibid. Obviously, the judge also failed to provide the "statement of reasons" that Dunne requires. Under the circumstances, the Court was constrained to vacate defendant's conviction. (State v. Jeffrey J. Schell, June 19, 2009; Adam W. Toraya, Designated Counsel)

JURY SELECTION

Judgment reversing conviction affirmed by the Supreme Court. The Court refined slightly the methodology to be applied in gauging bias claims in the jury selection process, reaffirming that a three-step process must be employed whenever it has been asserted that a party has exercised peremptory challenges based on race or ethnicity. Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination. The standard established by State v.]Gilmore, 103 N.J. 508 (1986)] -- that the presumption in favor of the constitutionality of a peremptory challenge can only be rebutted if it is demonstrated that there is a "substantial likelihood" that a peremptory challenge was based on a constitutionally infirm basis -- requires updating. Johnson v. California, 545 U.S. 162 (2005), decided nineteen years after Gilmore, clarified and moderated that standard. Johnson makes clear that the burden to overcome the presumption of constitutionality of a peremptory challenge exercise is far less exacting than was originally stated in Gilmore. It refined that burden thusly: "a defendant satisfies the requirements of [the] first step by producing evidence sufficient to draw an inference that discrimination has occurred." In the exercise of our obligations under the New Jersey Constitution, we import the Johnson modification into the standard applicable to the first step of the Gilmore test. Coupled with the passage of more than seven years since jury selection, the effect of that delay on the recollection of the participants, and the incompleteness of the record resulting therefrom, the absence of a searching judicial review of those factors forecloses the meaningful examination of any contest of the State's exercise of peremptory challenges in this case. In those

circumstances, there is no reasonable or significant alternative to the remedy aptly ordered by the Appellate Division: vacating defendant's convictions and remanding the case for a new trial. (State v. Oscar Osorio, July 2, 2009; Diane Toscano, A.D.P.D.; Alison S. Perrone for amicus curiae ACDL-NJ)

LESSER INCLUDED OFFENSES

Conviction for robbery reversed by the Appellate Division because of the trial court's failure to charge the jury with the related theft-crime of **receiving stolen property**, N.J.S.A. 2C:20-7, a third-degree offense and ordered a new trial so that a jury may consider finding defendant guilty of that lesser theft crime, which was reasonably supported by his testimony and other proofs, as an alternative to robbery. Defendant was found in possession of the victim's engagement ring within a half hour after her purse was taken from her at gunpoint. The victim's identification of the robber, although admissible at trial, was subject to credibility impeachment. Neither her purse nor a handgun were found on defendant's person. His fingerprints were not on the handgun found in the vicinity by the police. In his own sworn testimony, defendant denied that he had taken anything from the victim or that he had possessed a gun that evening. If, for the sake of argument, the jurors had accepted defendant's version of how he came into possession of the ring and had doubted the victim's identification of defendant as her robber, they would have had an ample rational basis to find defendant guilty of receiving stolen property instead of robbery. (State v. Hameed S. Brooks, June 22, 2009; Susan Brody, A.D.P.D.)

Conviction reversed by the Appellate Division, which agreed with defendant's argument that it was plain error for the judge not to charge **third-degree significant bodily injury aggravated assault**. The victim's injuries clearly indicate only a "temporary loss of the function of any bodily member or organ" because there was no permanent damage resulting from the stabbing. The victim sustained permanent scarring, but the other injuries in this case were significant but only temporary in nature. Therefore, although the jury could still find defendant attempted to commit serious bodily injury, the facts adduced at trial clearly indicate that a jury could have found only a "significant bodily injury" while acquitting on the

"serious bodily injury" charge. The State agreed to this possibility when it conceded at trial that Lugo "did not receive what the law would consider to be a serious bodily injury," although the State argued that defendant did still attempt to inflict a "serious bodily injury." Under these circumstances, the judge was obligated to sua sponte charge the jury on third-degree aggravated assault." (State v. Christopher Lockett, August 7, 2009; Stephen P. Hunter, A.D.P.D.)

MEGAN'S LAW

Appellate Division opinion striking down municipal ordinances prohibiting sex offenders from living within a designated distance from specified areas affirmed by the New Jersey Supreme Court. At oral argument, the Court was urged to provide guidance about the limits to Megan's Law's preemption of municipal action in respect of convicted sex offenders. Cherry Hill also sought to have this Court address hypothetical variations of its present ordinance, presumably to glean advice that might salvage an ordinance to replace the one invalidated. The Court refused to answer abstract questions or give advisory opinions. All that was before the Court was the viability of the challenged ordinances, and that was all it addressed. (G.H. v. Township of Galloway, May 7, 2009; Michael Z. Buncher, D.P.D., on the letter brief for amicus curiae Public Defender)

POST-CONVICTION RELIEF (PCR)

Denial of PCR affirmed in part, reversed in part, remanded for evidentiary hearing on defendant's claims that he was denied the effective assistance of counsel because counsel: 1) failed to file a motion to suppress his statement to the police; 2) was not prepared for trial and did not provide legal advice regarding jury selection; 3) failed to use and provided the prosecutor with certain 'confidential' information; and 4) was not prepared for and erred in his handling of the defense witnesses and the cross-examination of the State's witnesses. (State v. A.B., June 9, 2009; Monique Moyes, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. Defendant claimed that he told trial counsel that his live-in girlfriend, Tawanda Wilfong, was present in the parking lot of the Shop Rite on

the day of the robbery. Her actual presence at the scene was corroborated by the officers' own questioning of defendant during the taking of his formal statement. Wilfong saw the police grab defendant as soon as he "stepped over the barrier," implying that there was no assault beforehand. Wilfong claimed that "one police officer grabbed defendant by the jacket and threw him to the ground" before defendant did anything. In short, if credible, Wilfong's testimony could serve to negate an essential element of the robbery charge. For purposes of a prima facie case of ineffective assistance of counsel, defendant has satisfied the second prong of the Strickland/Fritz test. Based upon defendant's certifications he established that trial counsel never spoke to Wilfong at all, yet nevertheless concluded she was not credible because of her relationship to defendant. Having never contacted Wilfong, and absent some other explanation, that conclusion was not the product of reasonable decision-making. It is not entitled to deferential review, and therefore defendant established the first prong of the Strickland/Fritz test. Defendant had established a prima facie case for relief on his PCR petition, and the PCR judge mistakenly exercised his discretion in not providing for an evidentiary hearing before deciding the merits of the application. (State v. Michael Brown, June 30, 2009; Michael C. Kazer, Designated Counsel)

Denial of PCR affirmed in part, remanded for evidentiary hearing on one issue by the Appellate Division. The Court concluded that defendant should be given the opportunity to explore in greater detail the adequacy of trial counsel's preparation for and handling of the cross-examination of the State's forensic expert at an evidentiary hearing. In asserting the ineffectiveness of trial counsel, defendant argued that counsel should have recognized the significance of Dr. Miller's findings regarding the time of the victim's death and been better prepared to deal with those facts during cross-examination. A review of Dr. Miller's report leaves no doubt that he never expressed an opinion as to the time of death. He did, however, as alluded to in counsel's argument during the motion for new trial, assert that his microscopic examination of Yvette's brain revealed no acute hypoxic/ischemic change. The opinion he was allowed to express at trial, over defense counsel's objection, was that this finding could only mean that Yvette died within

two hours of her fatal head injuries. Considering defense counsel's own expressions about his performance at trial with regard to this expert testimony, and considering the critical role the time of death appears to have played in the conflicting theories of the case, it was appropriate to remand for an evidentiary hearing. At that time, the PCR judge can better assess the performance of trial counsel, the significance of the hypoxic/ischemic finding to the time of death, whether better preparation with this fact in mind could have made a difference in the cross-examination of Dr. Miller, and any other circumstance that may have relevance to this aspect of defendant's argument. (State v. Todd Crisci, May 7, 2009; Michele C. Buckley, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. Defendant filed a pro se petition for PCR, alleging ineffective assistance of plea counsel, contending that, although he answered "yes" to Question No. 17 in the plea agreement, '[d]o you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?', he was advised by counsel not to worry about the question because '[y]ou won't be deported because this is your first felony drug conviction.' Defendant's appeal of the order of deportation was dismissed. the trial judge should have provided defendant an evidentiary hearing to flesh out his allegation that his attorney affirmatively misinformed him not to worry about Question No. 17 on the plea form because '[y]ou will not be deported because this is your first felony drug conviction.' Defendant's certification presented a question of fact as to what was told to him by his plea counsel. In denying the application, the trial court noted that conducting an evidentiary hearing would serve little purpose because defendant would not be present, and it doubted that counsel would remember his conversation with defendant. While this may be so, defendant is still entitled to an evidentiary hearing on the issue of whether his attorney provided him misinformation concerning deportation. (State v. John Datus, July 14, 2009; Andrew P. Slowinski, Designated Counsel)

Denial of PCR affirmed in part, reversed in part by the Appellate Division, remanded for evidentiary hearing. Defendant's verified petition stood un rebutted with respect to the issue of coercion by the Narcotics Task Force and

the side deal with it by which defendant was guaranteed that there would be no record of his conviction if he pled guilty to the reduced charge. His explanation that he did not disclose this information to the court or his counsel because he understood it to be part of the undercover operation is plausible at first blush. Further, he acted consistently with this understanding of the real deal he had struck as part of his undercover work in his communications with others over the years after his conviction and his belief that it was lawful for him to have firearms. Because a valid plea cannot be induced by any promises not disclosed on the record, the judge must conduct an evidentiary hearing to determine the facts and decide the issue of whether defendant's plea was truly voluntary. Only then will the judge be in a position to determine if the defendant was coerced into pleading guilty or relied on a promise that was not disclosed at the time of the plea. (State v. William J. Kitsch, May 27, 2009; Michael Confusione, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. Evidence at the initial trial supported the claim that defendant abused J.B. on three occasions while in a school bathroom. Defendant sought to rebut that evidence by testifying that school policy dictated that special needs students such as J.B. be escorted to the bathroom by an unclassified student to prevent roaming in the halls. Defendant also testified that an aide, Crystal St. Louis, performed escort duties for J.B., thereby suggesting that the abuse could not have taken place as alleged. The PCR judge was incorrect in attributing testimony regarding J.B.'s escorts to school principal Gregory. The record clearly indicates that Gregory, on rebuttal, denied that an escort was assigned to J.B., thereby severely undercutting defendant's assertion to the contrary and his primary defense to criminal liability. Moreover, because the judge's erroneous factual conclusion formed the foundation for his legal determination that the prosecutor did not engage in deceptive practices, that conclusion cannot stand. Additionally, defendant made a prima facie showing of ineffective assistance of counsel. Defendant has shown that counsel failed to call St. Louis as a witness, failed to raise with either St. Louis or Sharp-Conte the lack of corroborative proof through conduct on J.B.'s part that he had been sexually assaulted by defendant, and failed to raise with either Sharp-Conte or Gregory the fact of St.

Louis's assignment to J.B. as his monitor. (State v. Askia Nash, August 5, 2009; Adam W. Toraya, Designated Counsel)

Denial of PCR reversed by the Appellate Division, case remanded for new hearing. At Defendant's initial PCR hearing, his trial attorney testified that the heart of defendant's alibi was a speeding ticket issued in his name in South Carolina three hours before the murder occurred in New Jersey, and he opted not to call family members who would testify that defendant had been in Florida after the murder. The Appellate Division concurred with the PCR judge that the trial attorney's trial strategy did not amount to ineffective assistance of counsel. The Supreme Court remanded to allow "defendant to present alibi-related witnesses." On remand, the PCR judge permitted only defendant's three Florida family members to testify. Finding Defendant should have been permitted in addition to present the testimony of his New Jersey witnesses, the appellate panel reverses and remands the denial of Defendant's petition for PCR relief. (State v. Duquene Pierre, June 19, 2009; Patricia Drozd, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing by the Appellate Division. First, the Court disagreed with the trial judge's conclusion that Roberts' PCR petition is time barred by the five-year-limitation provision of Rule 3:22-12(a). The basic premise of Roberts' case is that he pled guilty to a crime he did not commit because he was informed by the State and his defense attorney that he had been positively identified by the victim when, in fact, the victim subsequently claimed that she had been unable to identify her assailant. Roberts did not learn of the victim's claim that she had never been able to identify her assailant until sometime in 2004, when his court-appointed counsel in the SVP matter sent investigators to speak with the victim. She did not give her first written statement to that effect until September 2005. While this apparent "recantation" might have been discovered had counsel actually been appointed in connection with Roberts' motion in January 2001, counsel was never appointed because the application was denied prior to processing of the appointment. Under those circumstances, the "excusable neglect" standard of Rule 3:22-12(a) has been satisfied. The more important question was whether Roberts had articulated a prima facie case of ineffective assistance of counsel that would warrant a hearing. Roberts' argument is premised on the assertion

that his defense attorney told him that the victim had identified him and that he, defense counsel, had verified that assertion, when, in fact, the victim had not made such a positive identification. If true, that would constitute deficient representation. Indeed, if there was actually no positive identification by the victim, there might be additional grounds for relief. Because there were conflicting statements under oath from the victim as to whether she made a positive identification of the defendant, a plenary hearing was necessary to resolve the conflict. (State v. Rodney Roberts, July 17, 2009; Thomas G. Hand, Designated Counsel)

PRE-TRIAL INTERVENTION (PTI)

The Appellate Division reverses and remands this matter on procedural grounds, concluding that defendant was mistakenly deprived of the opportunity to apply for PTI. Guideline 3(i) provides that defendants charged with the sale of Schedule I or II narcotic drugs "should ordinarily not be considered for enrollment" in PTI unless the prosecutor joins in the application. However, this does not mean that such defendants can be denied the opportunity to apply in the first place. Because defendant was not given the opportunity to make his application to the Criminal Division Manager, the Court reversed the order on appeal and remand to permit defendant to submit his PTI application to the Criminal Division Manager, who shall consider the application on its merits. (State v. Robert Dwayne Green, May 12, 2009; Daniel P. McNerney, A.D.P.D.)

Appeal of order admitting defendant into PTI over the State's objection dismissed by the Appellate Division because the State filed the appeal more than the 15 days after the entry of the order allowed by R. 3:28(f). The State must appeal from an order enrolling defendant into PTI over the prosecutor's objection within fifteen days in order to challenge such orders. As the State's appeal was not filed within the fifteen-day time limit, the State has not satisfied the requirements necessary to prevent the preclusionary effect of enrollment. As the defendant had an expectation of finality because the notice of appeal was not timely filed to prevent a preclusion by virtue of defendant's participation in the PTI program, the appeal was dismissed. (State v. George L. Robbins, May 18, 2009; Lon Taylor, A.D.P.D.)

PROSECUTORIAL MISCONDUCT

Convictions reversed by the Appellate Division because the prosecutor improperly commented on defendant's demeanor at trial during the cross-examination of one of his mental-health expert witness and again during summation. The disputed cross-examination and summation involved, in part, defendant's demeanor and conduct while sitting at counsel table. Defendant's interaction with Mack, the expert, if it did not take place in the presence of the jury, was not properly brought to the attention of the jury by the prosecutor. The same is true of Wendis's general conduct at trial, which the prosecutor referred to in summation. During her summation, the prosecutor commented on (1) Wendis's failure to act during the trial as if he were hearing voices and (2) his interaction with Mack during a lull in the proceedings. The conversation with Mack likely took place when the jury was not present, and, even if the jury were present, the prosecutor characterized the discussion as "whispering," making it unlikely that the conversation was meant for the benefit of the jury. In addition, the prosecutor never sought to make a record of the incident at that time and never cleared her summation comment with the trial judge before it was made. The specific factual assertions concerning defendant's demeanor, which were the premise of the prosecutor's questions, were not part of the record. Consequently, the questions themselves were tantamount to unsworn testimony by the prosecutor about defendant's behavior the prior day. The prosecutor's references to defendant's demeanor during summation and her direct attack on defendant's defense through the use of her own unsworn testimony rises to a level of impropriety sufficient to deny defendant his right to a fair trial. (State v. Wendis Adames, August 5, 2009; William Welaj, Designated Counsel)

Conviction Reversed by the Appellate Division. When the prosecutor asked the jury why defendant was in A.G.'s house the night of one of the assaults, he suggested to the jury that if defendant had a reason for being there, he should have told it to the jury. This statement implied a failure by the defense to present evidence to answer that question. The State's remark raised a danger that the jury would draw an improper inference from defendant's failure to take the stand. The prosecutor made an additional improper comment on defendant's right to remain silent. In

explaining to the jury that it could consider corroborative evidence, the prosecutor implied to the jury that defendant had subpoena power and other means to present evidence. Finally, as the prosecutor was arguing to the jury that it heard evidence that A.G. contracted an STD from defendant, he referred to A.G.'s testimony that defendant had been the only person with whom she had sexual relations. The jury could have construed that argument to mean that there was additional evidence that defendant transmitted an STD to A.G., but the evidence was 'gone.' The record did not support that argument. There was no such evidence. As such, the prosecutor did not confine his comments to the evidence at trial. See also EVIDENCE. (State v. R.F., May 15, 2009; Michael C. Kazer, Designated Counsel)

Convictions reversed by the Appellate Division because the prosecutor's remarks in summation could not be considered anything other than wholly improper. The case before the jury was not about "guns and drugs and money." It was not about the "growing problem" of narcotics in society. The issue before the jury was whether the State had proven beyond a reasonable doubt that defendant possessed the drugs and weapons that were found in this apartment. That question had to be decided by a rational review of the evidence that had been presented, not by a call to arms, asking the jurors to protect their own streets from the scourge of the drug trade. These remarks were so improper and so capable of turning the jury against defendant and away from a considered review of the evidence that the Court had no recourse but to reverse his convictions. See also JURY INSTRUCTIONS. (State v. Alquadin Sales, July 27, 2009; Robert L. Sloan, A.D.P.D.)

Convictions reversed because the prosecutor's comments during summation significantly strayed beyond the bounds of fair response to defense counsel's closing argument and they had the capacity to deny defendant a fair trial. The prosecutor began his summation by acknowledging that the "primary source of evidence was Officer McKenzie" and stating that "basically what it comes down to, what [defense counsel] is saying is that Officer McKenzie lied." From there, the prosecutor made comments that were not based upon evidence in the record and, in our view, not based upon reasonable inferences that may be drawn from the evidence. the record contained no evidence to support the prosecutor's foray into the mathematics of McKenzie's day-to-day run-ins with inmates. Nothing in the evidence would

support the inference that McKenzie had ten close-contact interactions per day with inmates for twelve years. Additionally, McKenzie testified that in his twelve years, this was only the second time he charged an inmate with assault, not the second time he had been assaulted. Nothing in the evidence would support the prosecutor's statement that if McKenzie possessed the negative traits of being aggressive, antagonistic, or having "thin skin," then he "would have been assaulted 50 or 100 times." The prosecutor also opined to the jury that had McKenzie fabricated his story, the alleged confrontation would have been much more violent and the alleged injuries much more severe. These comments were pure conjecture. The prosecutor then commented on McKenzie's training, although no testimony had been elicited in this regard. Other comments were rhetorical excesses and unwarranted hyperbole, particularly in light of the prosecutor's earlier comment to the jury that a person willing to make up such a story "has no conscience" and has "a degree of depravity." Unquestionably, defense counsel's summation was forceful and focused upon defendant's contention that McKenzie was not credible. All of these comments related to evidence in the record, which was in stark contrast to many of the comments by the prosecutor that were not based upon the record or reasonable inferences gleaned from the evidence. (State v. Zaair Tuck, July 23, 2009; Gilbert G. Miller, Designated Counsel)

SEARCH AND SEIZURE

Ruling of unlawful arrest upheld, but dismissal of indictment reversed by the Appellate Division. The Court agreed with the motion judge that the **police officers were not lawfully permitted to enter the Anderson house to effectuate or complete their arrests** for the unspecified disorderly persons offenses. The record does not support a finding that Laquann and Shamar, who were unarmed and not acting violently towards the officers at that time, created a "serious threat to the public safety" justifying the warrantless entry, certainly when less intrusive measures, such as an attempt at a consensual entry or a telephonic warrant, were available, as Lunt testified. DiCugno, who was the first to enter the Anderson home, did not testify, so there is no explanation of his reasons for entering other than that he was merely seeking to effectuate Laquann's arrest. While Lunt expressed concern about DiCugno, who was being followed by Shamar, that concern

cannot be used to justify DiCugno's entry for present purposes. There was no testimony either officer entered the house out of concern that Laquann or Shamar would harm the residents. However, dismissal of the indictment was an improper remedy for the illegal entry because although the entry into the Anderson home was unlawful, **evidence concerning the alleged assaults on the police officers is not excludible as "fruit of the poisonous tree."** (State v. Lamar Anderson, Shamar L. Anderson, and Tisa B. Anderson, July 24, 2009; Timothy S. Farrow, Designated Counsel, for Laquann T. Anderson; Timothy P. Reilly, Designated Counsel)

Convictions reversed by the Appellate Division. A report that a man was pointing a shotgun was received by the police. Upon arrival at the scene, the police were informed by a female, who declined to give her name or a statement, that defendant — one of two or three black men at the location — was the culprit, and that he had placed the gun underneath a nearby black Cadillac, where it was in fact found. The police did not witness defendant pointing the gun or placing it under the car, and they had no evidence, other than the informant's statement, suggesting that defendant previously had the gun in his control. The Court did **not find the accusation of the anonymous informant sufficient to establish probable cause.** The anonymous tipster's information regarding a previously-occurring event, unwitnessed by the police, lacked reliability. Although the presence of a gun at the location specified by the tipster was corroborated, there was absolutely nothing that corroborates the identification of defendant as the person who previously wielded that gun. Nor is there any reason to believe that the tipster, who refused to identify herself or give a statement, was speaking the truth. For all that is known, the identification could have been made as a means for exacting revenge upon or otherwise harassing a seemingly innocent person. Such a bare-boned tip is simply insufficient to establish probable cause in this case. See also **CONFRONTATION**. (State v. Eugene Basil, May 4, 2009; William J. Sweeney, Designated Counsel)

Conviction reversed, suppression ordered by Appellate Division because the trial judge **erred in concluding that Stahl's affidavit established probable cause for the search warrant** for the apartment defendant was seen entering. After suppressing the marijuana seized from the glove

compartment of defendant's car, based on the finding that the police had demonstrated no "exigent circumstances" justifying that warrantless search and seizure, the trial judge deleted the reference to the discovery and seizure of that marijuana from Stahl's affidavit. Notwithstanding that redaction, however, the trial judge concluded that the affidavit was sufficient to warrant the search of the Guttenberg apartment. The Appellate Division disagreed, finding that no independent factors supported the search of the Guttenberg apartment. The warrant was based exclusively upon the confidential informant's statement that defendant "store[d] the bulk of his marijuana[]" at that apartment. This information, according to Stahl's affidavit, "was obtained as a result of the [confidential informant's] personal knowledge of and contact with the subject this investigation." The affidavit contains no explanation as to how the informant acquired this "personal knowledge." Nothing connected defendant to the Guttenberg apartment other than (1) the confidential informant's statement; and (2) the police observation of defendant exiting the building at 304 71st Street in Guttenberg. Without the evidence of the marijuana seized from defendant's vehicle, the affidavit failed to provide "clear and convincing" evidence that contraband would be found in the Guttenberg apartment. (State v. Julio Delacruz, August 12, 2009; Brian O'Reilly, Designated Counsel)

Conviction reversed, suppression ordered by the Appellate Division. The motion to suppress evidence obtained in a vehicular search – a gun found in a backpack not in plain view – was improperly denied. The State did not carry its burden of demonstrating a recognized exception to the warrant requirement where both occupants were outside the car and did not have access to the backpack; there was no possibility they would leave the area; the officers' conduct did not indicate a belief the occupants were armed and dangerous; there was no evidence of accomplices who might have come onto the scene or other persons who had access to the car destroying or disposing of the evidence or moving the car; the car was parked in a residential driveway so there was no issue of traffic obstruction; the ratio of officers to suspects was four-to-two; and the defendant was in a wheelchair. (State v. Yusef Gethers, May 19, 2009; Raquel Y. Bristol, A.D.P.D.)

Suppression of evidence and reversal of conviction affirmed by the New Jersey Supreme Court. The question was

whether the trial court properly issued a search warrant, conditioned on verification by the police of the particular apartment to be searched inside a two-unit apartment building. The State's affidavit in support of the search warrant clearly indicated that the police did not know in which of the two apartments at 105 Wayne Avenue the asserted criminal activity took place. As a result, the **search warrant was issued in violation of the requirement in our constitution that the warrant particularly describe the place to be searched.** The terms of the warrant that delineated the conditions that needed to be satisfied prior to the police execution of the warrant were deficient in at least two ways. First, the probable cause determination could not be made within the four corners of the affidavit as the anticipated conditions listed were to be satisfied after the warrant was issued. Second, because the police were authorized to determine if the conditions were satisfied, the role of the neutral and detached magistrate was delegated to the police. The failure of the police, prior to the issuance of the warrant, to inform the court by affidavit, by telephone, or in person, of the evidence it developed to determine the particular apartment unit that Daniels entered to retrieve drugs rendered the search warrant invalid. In short, the failure to comply with the particularity requirement and the failure to have a neutral magistrate or judge determine whether the conditions in the warrant were satisfied are constitutional violations. (State v. Quinn Marshall, July 21, 2009; Alison S. Perrone, Designated Counsel)

Convictions reversed by the Appellate Division, which held that the police did not properly invoke its **community caretaking function** to justify the stop of the white van in which defendants and Jaron Carroll, the van driver, were found. The officer had no objectively reasonable facts to stop the white van driven by Carroll. When the officer encountered the van, it was not disabled. The hood had been lowered, the engine engaged, and the van was pulling away from the curb and proceeded down the street. The van did not sputter, stutter, or emit any fumes or smoke. Thus, when the officer encountered the van, the reported facts that may have supported a response to provide assistance had vanished. Moreover, this stop crossed the constitutional line. It is also immaterial that once stopped, the facts rapidly escalated from an investigatory stop to exigent circumstances for a warrantless search of the van. The stop was not supported by objective and

reasonable facts to invoke the community caretaking doctrine, the fruits of the search should have been suppressed, and the use of that evidence at trial requires a new trial. (State v. Jerry Montgomery and Daniel Tokyo Gatson, August 3, 2009; Michael C. Kazer, Designated Counsel, for Montgomery)

Suppression of evidence affirmed by the Appellate Division. There were **no exigent circumstances justifying the search of defendant's car** and subsequent seizure of the contraband found in the trunk. When Officer DeSimoni discovered the small bag of marijuana at the lower part of the driver's side area of the car, he had probable cause to arrest both defendant and his passenger for possession of marijuana. Both defendant and the passenger were arrested and handcuffed. From that point, the police had complete control of the vehicle. There is no evidence to suggest that a third party was aware of defendant's location, and was therefore capable of assuming control of the car. Indeed, the police seized the vehicle at the scene, and had it towed to an impound lot. Any exigency initially created by the stop of defendant's vehicle evaporated after the police seized control of the car. (State v. Paul O. Tibby, June 12, 2009; Robert L. Sloan, A.D.P.D.)

SENTENCING - MISCELLANEOUS

Dismissal of State's appeal of allegedly "illegal" sentence affirmed by the Appellate Division. On August 22, 2008 defendant was 'sentenced as a 3rd degree' offender for a second-degree crime. By motion dated October 2, 2008, the State first moved before the sentencing judge "for a stay pending appeal." That motion was also denied on October 3, 2008. The State thereafter filed this appeal on October 9, 2008, almost a month and a half after the sentence was imposed. Even assuming that a sentence imposed without respect to the findings required by N.J.S.A. 2C:44-1f(2) can be deemed an "illegal" sentence, a downgraded offense, and the remedy for such a downgrade and sentence is embodied in that statute which requires the appeal to be filed within ten days of the sentence. See R. 2:9-3(d); N.J.S.A. 2C:44-1f(2). The appeal was dismissed as untimely. (State v. Brian Bowden, July 13, 2009; Mark H. Friedman, A.D.P.D.)

Conviction affirmed, remanded for re-sentencing by the Appellate Division, which found fault in the manner in

which the trial judge arrived at the term of seven years with a forty-two-month parole ineligibility period. Initially, the judge imposed a sentence of six years with a three-year parole ineligibility period. This led to a colloquy between the prosecutor and the judge in which the prosecutor complained that there was "no incentive for him not to go to trial" because "5 with a 36" was the plea offer, after which the judge increased the sentence to "7 years with a 42-month stip". By taking the pre-trial plea offer into consideration at sentencing, the trial judge did not follow the correct sentencing guidelines, nor did he apply the sentencing guidelines only to the relevant facts. When, as occurred here, a defendant rejects the State's plea offer, the plea negotiations are void for all purposes and can be afforded no substantive weight by either the trial or appellate court. (State v. Jack Canty, June 16, 2009; Jack L. Weinberg, Designated Counsel)

Remanded for reconsideration of sentence regarding **consecutive indeterminate sentences** by the Appellate Division. Revocation of the suspension of defendant's sentences and imposition of reformatory terms affirmed, and imposition of consecutive terms justified under State v. Yarbough, 100 N.J. 626, 643-644 (1985). However, the question remaining is whether the Yarbough criteria govern consecutive indeterminate terms, which are provided by the Legislature as an alternative to the ordinary "sentences otherwise authorized by the [C]ode." N.J.S.A. 2C:45-3. The distinction suggests different criteria for consecutive sentencing. When Yarbough's rationale is considered, its offense-based criteria cannot be understood as controlling indeterminate sentences made available by the Legislature in the interest of rehabilitating eligible youthful offenders which is an offender-based decision and goal. Therefore, consecutive indeterminate sentences for youthful offenders must be justified with reference to offender-based criteria centered on rehabilitation, and subject to direction to avoid routine use of consecutive terms for youthful offenders. The Legislature elected to retain indeterminate sentences for youthful offenders to allow an opportunity for rehabilitation in a proper case, and it is more likely that the Legislature would intend that judges impose consecutive indeterminate sentences, as they had prior to enactment of the Code. Because defendant's consecutive indeterminate sentences were justified with reference to the Yarbough criteria, on re-sentencing, the

trial judge can consider whether consecutive indeterminate sentences are warranted based on criteria relevant to defendant's rehabilitation. One relevant factor is defendant's potential to benefit from rehabilitation during a term of incarceration. (State v. Michael P. Hannigan, July 22, 2009; Raquel Y. Bristol, A.D.P.D.)

Convictions affirmed, case remanded by the Appellate Division for resentencing to ordinary term. Defendant was sentenced to an **extended term** as a persistent offender. A California conviction was a critical element of the decision that defendant qualified as a persistent offender. The California conviction is equivalent for sentencing purposes to a fourth degree offense in this State, and fourth degree offenses are not qualifying convictions for extended term sentencing as a persistent offender. The Court also agreed with defendant's argument that the nature of the prior convictions and the application of NERA to the attempted murder conviction support the conclusion that the imposition of an extended term was a **mistaken exercise of discretion**. Here, the last qualifying offense occurred two months shy of the ten-year outer limit. Defendant's two prior convictions, assuming the California conviction is a qualifying conviction, were for non-violent offenses for which defendant received probationary terms. Until the physical attack on the victim in this case, defendant had no prior qualifying convictions of a violent nature. The first degree status of attempted murder, coupled with the NERA requirement that defendant serve 85% of any term imposed, yields a lengthy term of imprisonment. The imposition of an extended term of imprisonment was a mistaken abuse of the judge's sentencing discretion. (State v. Raylewis George Hughes, Jr., June 30, 2009; Amira R. Scurato, A.D.P.D.)